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January 12, 1998

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street NW
Washington, D. C. 20554

In the Matter of:	)	
	)	
Amendment of Rules Governing Procedures to be	)	
Followed When Formal Complaints Are Filed	)	CC Docket No. 96-238
Against Common Carriers	)	
	)	

Dear Ms. Salas:

Enclosed are an original and four copies plus two additional public copies of the Comments of Cincinnati Bell Telephone Company pertaining to *Public Notice* 97-2178 and the above referenced proceeding. A duplicate original copy of this letter is enclosed; please date stamp this copy as acknowledgment of its receipt and return it. Questions regarding this filing may be directed to David L. Meier at the above address or by telephone on (513) 397-1393.

Sincerely,

David L. Meier

Enclosures

cc: International Transcription Services, Inc.
Enforcement Task Force, Office of General Counsel, FCC
Enforcement Division, Common Carrier Bureau
Jeffrey H. Dygert, Enforcement Division,
Common Carrier Bureau (diskette)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing	)	
Procedures to Be Followed When	)	
Formal Complaints Are Filed Against	)	
Common Carriers	)	

COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY ON ACCELERATED DOCKET FOR COMPLAINT PROCEEDINGS.

On December 12, 1997, the Common Carrier Bureau sought comments on its proposal to create an Accelerated Docket for complaint adjudication that would provide for the presentation of live evidence and argument in a hearing-type proceeding and operate on a 60-day time frame or some other compressed time schedule. Comment was sought in nine particular areas. CBT hereby submits its comments, organized according to each of the nine specified areas.

1. Need for Accelerated Docket. While it is not necessarily opposed to the creation and use of a hearing-type process for adjudicating certain complaints, CBT does not agree that a 60-day Accelerated Docket process is necessary. The Commission's recently-adopted rules governing formal complaint proceedings have greatly streamlined the complaint process in order to satisfy the requirement of the Telecommunications Act of 1996 that Section 208(b) complaints be resolved within five months and that other specific types of complaints be resolved even faster. CBT is not aware of any particular substantive category of disputes that

would benefit from an Accelerated Docket procedure other than those statutory complaint proceedings that have deadlines shorter than five months, which may need a more abbreviated procedure in order to meet the stated deadlines.[1] However, to subject all types of complaint cases to such shorter deadlines would unnecessarily impair the ability of the parties to develop the record and fully submit the case for decision.

Comment was also sought on whether the Accelerated Docket should be limited to issues of competition in the provision of telecommunications services and how the Commission could best work cooperatively with state commissions. The Commission can best work cooperatively with the state commissions on such enforcement matters by leaving it to the states to address competitive disputes arising out of interconnection agreements, resale and the sale of unbundled elements. CBT does not believe it is appropriate for the Commission to apply an Accelerated Docket to disputes arising under §§ 251 and 252 of the Act because such disputes are within the primary jurisdiction of state commissions and there is no need for the Commission to establish procedures for these matters. Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

In the Eighth Circuit proceedings reviewing the Commission's August 8, 1996 Interconnection Order, the question arose whether the Commission could use its Section 208 complaint authority to review interconnection agreements. The Court held in its July 18, 1997 decision:

> The language and design of the Act indicate that the FCC's authority under section 208 does not enable the Commission to review state commission determinations or to enforce the terms of interconnection agreements under the Act.

[1] New statutory complaint subjects having shorter time deadlines for resolution are § 260(b) (120 days), § 271(d)(6)(B) (90 days) and § 275(c) (120 days).

120 F.3d at 803.

> We also believe that state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252. . . . Significantly, nothing in the Act even suggests that the FCC has the authority to enforce the terms of negotiated or arbitrated agreements or the general provisions of sections 251 and 252. The only grant of any review or enforcement authority to the FCC is contained in subsection 252(e)(5), and this provision authorizes the FCC to act only if a state commission fails to fulfill its duties under the Act. The FCC's expansive view of its authority under section 208 is thus contradicted by the language, structure, and design of the Act.

120 F.3d at 804.

As the court explained, sections 251 and 252 fundamentally involve local intrastate telecommunications matters. Section 2(b) of the Act fences off intrastate matters from FCC jurisdiction, consequently, the Commission should not attempt to exercise complaint jurisdiction over matters covered by local interconnection agreements.[2] "We refuse to undermine our earlier decisions by interpreting the Act and section 208 as authorizing the FCC to review state commission determinations and to enforce state-approved agreements." 120 F.3d at 804. Hence, competitive complaints should not be coming before the Commission and there is no need to create a new set of accelerated procedures to handle such cases.

2. Minitrials. CBT agrees that minitrials of complaints could permit closer inquiry into factual issues and more effective credibility determinations than are possible on a paper record. However, there is no inherent connection between the use of such a live hearing process and the use of an Accelerated Docket. Thus, the minitrial process might be considered as a potentially useful tool in complaint cases generally, but this should not depend on whether

[2] The Commission has not sought review of this holding directly, but did include it in footnote 5 of its Petition for a Writ of Certiorari, filed in the United States Supreme Court, Case No. 97-831, as an issue allegedly subsumed in the broader § 2(b) issue. The Commission should not create procedural rules for § 208 complaints arising under §§ 251 or 252 of the Act so long as the Eighth Circuit's decision is in effect.

the case is on an Accelerated Docket. In fact, the 60-day process currently under consideration may leave inadequate time in which to complete pleadings, discovery and preparation of testimony and cross-examination in order to conduct an efficient and orderly evidentiary hearing.

Where live hearings are conducted, it may be appropriate to limit the amount of time each side has in which to present its evidence; however, CBT would caution that the time not be so limited as to prejudice the adequate presentation of a party's case. The amount of required hearing time will likely vary case by case and the Commission should build sufficient flexibility into the rules to allow an adequate amount of hearing time for the particular case and to give each party due process. Inclusion of cross-examination time within the same overall time limit as direct testimony may prejudice the party that goes second at the hearing. Knowing that the time the other party has in which to present its case is limited could encourage the first party's witnesses to consume more time than is necessary in response to cross-examination in an effort to impede the presentation of the opposing party's case. A solution to this problem may be to use pre-filed testimony. However, this is only feasible if sufficient time is allowed in which to prepare the testimony and exchange it in advance of the hearing.

3. Discovery. The compressed time frames suggested in the Accelerated Docket would make it extremely difficult to conduct meaningful discovery and also adequately prepare for a hearing to take place 45 days after the filing of the complaint. Usually discovery responses yield a greater amount of material than would be introduced into evidence at the hearing. Oftentimes, initial discovery responses lead to follow up discovery requests. The hearing itself should be a focused presentation of the evidence in the case pertinent to the

issues to be tried. If enough time is not allowed for proper discovery and organization of the material into testimony in advance of the hearing, the hearing itself may degrade into the equivalent of discovery, which would waste time and require the consideration of a greater volume of material than would otherwise be presented.

The Commission's rules on adjudicating complaints require the disclosure of evidentiary material supporting the pleadings at the time they are filed. The compressed time schedules proposed for an Accelerated Docket would practically force a party to rely upon the opposing side's voluntary disclosure as its only discovery. However, such a voluntary disclosure rule is not a complete substitute for discovery initiated by a party. Purely voluntary disclosure could result in too little material being exchanged, which would severely handicap a party that was not permitted to conduct its own discovery or that was given too little time in which to conduct discovery. Even the proposed Eastern District of Texas' standard of "likely to bear significantly on any claim or defense" would not cure this inherent problem. Such a standard relies on the producing counsel's judgment as to what is important as opposed to what the other party feels it needs to try the case. Further, even that Court does not rely solely on such voluntary disclosures to accomplish the entire discovery in a case, but only uses this as a starting point. The best result is still to allow party-initiated discovery in order to ferret out information that the party is actually interested in receiving as opposed to "voluntary" production of information.

With respect to the question of sanctions, at a minimum, the failure of a complainant to provide proper disclosure and discovery responses ought to result in taking the case off the Accelerated Docket. Any other result would reward dilatory practice. Complainants would not have an incentive to stonewall in discovery if to do so would prevent their cases from

coming to hearing promptly. Other possible discovery sanctions could include deciding the issues posed by the discovery in favor of the opposing party or preventing the party that does not comply from introducing evidence on the issues presented by the discovery or raising defenses on such issues.

4. Pre-Filing Procedures. CBT agrees that a complainant seeking accelerated treatment of its complaint should have to certify that it attempted to settle the dispute before filing the complaint. However, CBT believes it may be inappropriate for the Task Force to become too involved in settlement discussions prior to the filing of a Complaint. Should such pre-filing discussions occur, the same Task Force members involved in the settlement discussions should not also participate in the adjudication of the matter. It is typical for judges hearing a case without a jury not to preside over settlement discussions, but to involve an independent party, so as not to prejudice the fact finder who must ultimately resolve the dispute.

CBT agrees that defendants should have the ability to seek expedited treatment of a matter when a complainant has not done so. Otherwise, only complainants would have the ability to seek expedited resolutions.

However, as the Bureau and Task Force recognize, certain procedures would be necessary to protect the confidential or proprietary information of parties engaged in informal, pre-filing settlement discussions. A party may, depending on the circumstances, wish to have a confidentiality agreement with a potential adversary prior to engaging in informal settlement negotiations during the pre-filing period. Given the reality that parties engaged in informal settlement discussions are potential adversaries, it may prove difficult for them to negotiate a mutually acceptable confidentiality agreement in the short time envisioned by the Public

Notice. Consequently, the Bureau and Task Force should consider developing a standard Confidentiality Agreement that would govern the parties' relationship during the pre-filing period and thereafter. With a standard Confidentiality Agreement, the parties would not spend precious time trying to agree upon an acceptable agreement.

5. Pleading Requirements. CBT believes a seven-calendar day answer period would be unreasonably short. The documentary requirements imposed on defendants by the Commission's new complaint rules are burdensome and would become onerous, if not impossible, to comply with in such a short time frame. Considering the time that is often required to route complaints to the appropriate personnel within a company, to identify and interview the individuals knowledgeable on the subject of the complaint, to research and prepare the answer, and to gather supporting evidentiary material, seven days is an unreasonable time. This is more reason why an accelerated docket should be unusual and not the standard procedure. In any event, the Bureau and Task Force should clarify that, whatever will be the time period within which an answer to a complaint must be filed, the time period only begins to run from the time the defendant is served with the complaint.

6. Status Conferences. For the same reasons a seven-day answer period would be unreasonable, CBT opposes a status conference fifteen days after the filing of the complaint. Since it is contemplated that discovery matters would be resolved at the status conference, almost no time would be allowed for the development and exchange of discovery requests and to formulate responses or objections to discovery that might be ruled upon at the status conference. Further, the rules contemplate that the "meet and confer" would have already occurred. This requires that the parties discuss settlement, discovery, issues in dispute and scheduling and file a joint written statement outlining the agreed and disputed issues in the case

two days before the status conference. The proposed schedule would give the parties virtually no time in which to accomplish all of this. The rules further seem to assume that the parties and their respective counsel have no scheduling conflicts during the time the complaint is to be adjudicated. If counsel or key personnel of a party have any significant pre-existing commitments, the proposed schedule would be even more unreasonable.

7. Damages. Certainly, the time pressures of an Accelerated Docket would make it difficult to address both liability and damages in a single proceeding. Thus, it would seem fitting to restrict this procedure to a bifurcated claim. However, it is not clear that the accelerated procedure is more fitting for liability claims than it would be for damage issues. It largely depends upon the particular matter which phase would be more time consuming. It is just as possible that the liability phase of a complaint case could be more difficult and time consuming to resolve. As stated above, there is no inherent linkage between a minitrial proceeding and an Accelerated Docket. A live hearing procedure could be used for either the liability or the damages phase of a complaint case without the case necessarily being handled in an accelerated fashion.

8. Other Issues. Cincinnati Bell is concerned that minitrials not become financially burdensome to smaller LECs by increasing the expense of resolving complaint cases. It would appear that minitrials would greatly increase the expense for counsel and travel, especially for carriers without a significant presence in Washington, DC. The rules do not address matters such as the location or time of hearings. Presumably, it is intended that hearings would be conducted at the Commission's offices in Washington, DC. This would implicate questions such as how witnesses could be compelled to attend, who is responsible for the expense of bringing witnesses to the hearing and what happens if a witness is physically unavailable to

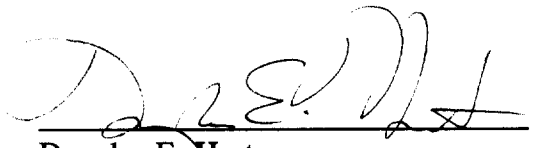
attend at the time the hearing is scheduled. The rules also do not state how much advance notice parties would receive before the hearing date, what degree of influence the parties have over the hearing date in order to avoid scheduling conflicts, or whether a hearing could be continued in case an unavoidable conflict arose. These are all issues that should be addressed.

9. Review by the Commission. The parties should have an opportunity to brief to the Commission whether a decision of the Task Force should be adopted, reversed or modified. In order to allow sufficient time for such briefing and a Commission decision within the applicable deadline, the rules should establish a deadline for the Task Force to release its initial decision. A period of 20 to 30 days for briefing after the Task Force decision would be appropriate.

It is unclear whether the proposal for *en banc* oral argument to the Commission is for such argument to take place before the Commission renders its decision (except that it apparently would have already decided not to summarily adopt the Task Force decision), or whether such review is intended to occur after the Commission has reviewed the Task Force decision, but only in cases where there was no summary adoption. If the proposal is the former, CBT believes such a procedure may skew the proceedings because the parties would already know that the Commission did not accept the Task Force decision. If the proposal were the latter, it would tend to unfairly favor the party prevailing at the Task Force level. That party would automatically get an opportunity to reargue the case to the Commission; however, when the Commission summarily adopts a Task Force decision, the losing party would not get such an opportunity. CBT believes that such an *en banc* procedure should occur either before <u>any</u> decision is announced by the Commission, or only after an initial

Commission decision where a party seeks to convince the Commission to reverse itself. In any event, such an *en banc* procedure should be limited to matters of significance.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing comments of Cincinnati Bell Telephone Company have been sent by first class United States Mail, postage prepaid, or by hand delivery on January 12, 1998, to the persons listed on the attached service list.

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